COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-145

JOHN DOE, SEX OFFENDER REGISTRY BOARD NO. 209276

vs.

SEX OFFENDER REGISTRY BOARD.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

After a November 7, 2016 de novo hearing before a hearing examiner, the Sex Offender Registry Board (board) classified the plaintiff as a level three sex offender. The plaintiff sought judicial review of the board's decision, pursuant to G. L. c. 30A, § 14, and G. L. c. 6, § 178M. A Superior Court judge denied the plaintiff's motion for judgment on the pleadings and affirmed the board's decision. On appeal, the plaintiff argues that the board's decision was arbitrary and capricious and an abuse of discretion, citing several regulatory factors as erroneously applied. He also argues that his level three classification was not established by clear and convincing evidence and that it violated his constitutional due process rights. We affirm.

Background. The plaintiff's classification as a level three sex offender followed his March 24, 2008 convictions on four counts of forcible rape of a child and three counts of indecent assault and battery on a child, stemming from the plaintiff's sexual assaults on his biological daughter from May, 2003 through September, 2006, when the victim was between six and eight years old. The defendant was sentenced to serve from eight years to eight years and one day in prison, followed by ten years of probation. After his release from custody, the plaintiff moved to the State of New York. At the time of the classification hearing, the plaintiff was thirty-eight years old and living in Massachusetts.

Discussion. The board's decision may only be set aside if "the decision is unsupported by substantial evidence or is arbitrary or capricious, an abuse of discretion, or not in accordance with law." Doe, Sex Offender Registry Bd. No. 10216 v. Sex Offender Registry Bd., 447 Mass. 779, 787 (2006) (Doe No. 10216). Substantial evidence is "such evidence as a reasonable mind might accept as adequate to support a conclusion." G. L. c. 30A, § 1 (6). Evidence establishing a sex offender classification must be "clear and convincing" to satisfy the substantial evidence requirement. Doe, Sex Offender Registry Bd. No. 380316 v. Sex Offender Registry Bd., 473 Mass. 297, 298 (2015) (Doe No. 380316).

Our review is highly deferential to the board, giving "due weight to the experience, technical competence, and specialized knowledge of [the board], as well as to the discretionary authority conferred upon it." Doe No. 10216, supra, quoting G. L. c. 30A, § 14 (7). The hearing examiner's role is to "assess the reliability of exhibits introduced into evidence and credibility of witnesses; [and] draw all reasonable inferences therefrom." 803 Code Mass. Regs. § 1.19(1)(h) (2016). See Doe, Sex Offender Registry Bd. No. 10800 v. Sex Offender Registry Bd., 459 Mass. 603, 633 (2011) (Doe No. 10800) ("province of the board, not this court, to weigh the credibility of the witnesses and to resolve any factual disputes"). Moreover, "the rules of evidence . . . shall not apply to classification hearings," so a hearing examiner may consider any evidence that "reasonable persons are accustomed to rely on in the conduct of serious affairs." 803 Code Mass. Regs. § 1.18(1) (2016).

1. Application of regulatory factors under 803 Code Mass. Regs. § 1.33 (2016). a. Repetitive and compulsive behavior (factor 2), diverse victim type (factor 21), number of victims (factor 22). The plaintiff argues that the judge wrongly applied these factors on the basis of unreliable hearsay contained in a police report for which no conviction resulted.[1]

[1] Apart from the incident detailed in the police report, we note that the application of factor 2 was supported by the index

First, a hearing examiner may consider evidence of a defendant's criminal conduct, even though no conviction resulted. See Doe, Sex Offender Registry Bd. No. 356011 v. Sex Offender Registry Bd., 88 Mass. App. Ct. 73, 79-80 (2015). Second, hearsay evidence is admissible, as long as it bears adequate indicia of reliability. See Doe No. 10800, 459 Mass. at 638.

Here, the police report relayed the plaintiff's estranged wife's 2005 complaint that she felt someone grab her bottom as she slept in bed with another man in his apartment. When awoken by the contact, she saw the plaintiff walking out of the bedroom. A few minutes later, the plaintiff returned to the man's apartment to confront the wife. The wife and the man went to the police department to report the incident about one hour after it took place. The police interviewed them separately regarding not only the incident in question, but also the history of the relationship among the parties. The police were able to contact the plaintiff about two hours later and, after giving him an opportunity to discuss the incident, the police informed him that they would be filing for criminal charges arising out of the wife's allegations. Fifteen minutes later, the wife reported to the police that the plaintiff had called her and said that he was not going to pay her apartment utility

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offenses, which involved repeated sexual assaults against the same person over the course of several years.

bills unless she made up her mind not to testify against him.[2] Given the level of detail provided in the report, which immediately followed the incident, there was sufficient indicia of reliability for the hearing examiner to have relied on it.[3] See Doe, Sex Offender Registry Bd. No. 136652 v. Sex Offender Registry Bd., 81 Mass. App. Ct. 639, 649-650 (2012) (discussing methods of determining reliability of hearsay evidence). There was no error.

b. Alcohol and substance abuse (factor 9). The plaintiff contends that the hearing examiner erred in applying this factor and should have given it no weight. He argues that his substance abuse took place between the ages of thirteen and twenty-two and that it was not a factor in his offenses. Yet, factor 9 is applicable when (1) the sex offender has a "history of substance abuse," (2) the sex offender "demonstrates active substance abuse," or (3) when the substance abuse "was a contributing factor in the sexual misconduct." 803 Code Mass. Regs. § 1.33(9). Recognizing that substance abuse did not appear to be a current issue, the hearing examiner "temper[ed]"

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[2] The plaintiff was charged with breaking and entering in the night with intent to commit a felony, indecent assault and battery on a person age fourteen or older, and witness intimidation. Ultimately, the charges were dismissed after the wife asserted her marital privilege.

[3] We note the hearing examiner was careful to disregard other evidence of sexual misconduct that did not bear sufficient indicia of reliability.

the aggravating weight of this factor. Given the plaintiff's history of substance abuse, there was no error in the hearing examiner's application of this factor.

c. Other useful information related to the nature of sexual behavior (factor 37). The plaintiff contends that the hearing examiner also erred in failing to give adequate consideration to mitigating factors offered by him, specifically (1) articles he submitted regarding sexual offender recidivism, (2) New York State records relating to the plaintiff's risk to reoffend, and (3) a letter of support.

As to the articles, the hearing examiner explained that he did not give them "much weight" because the regulatory factors incorporate similar research. As to the New York State records, the hearing examiner explained that he gave the risk determination contained within them "limited consideration" because it was arrived at through actuarial testing and not by application of the comprehensive factors contained in the Massachusetts regulations. The plaintiff has not articulated how the hearing examiner's weighting of these factors constitute error.

As to the letter of support, the plaintiff contends that the hearing examiner erred in giving it "minimal weight" (with respect to factor 33, home situation and support systems) because he based his determination on the erroneous assumption

that the author of the letter was unaware of the plaintiff's sex offender history. The plaintiff argues that, because the letter was addressed to the New York State Board of Examiners of Sexual Offenders, the author must have been aware. While the letter may indicate that the author was aware of the plaintiff's status as a sex offender, it does not indicate any knowledge of the plaintiff's actual history of offending. Moreover, the hearing examiner discounted the letter also because the author did not offer any specific support to the plaintiff; it was simply a character reference. There was no error in the hearing examiner's consideration of mitigating factors.[4]

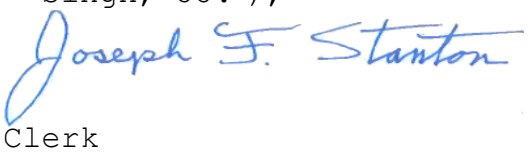
2. Clear and convincing evidence of classification level. The plaintiff also contends that his level three classification was not established by clear and convincing evidence. He argues that most of the regulatory risk elevating factors were not applicable and that he had a number of risk mitigating factors in his favor. As previously discussed, the hearing examiner's application of the regulatory factors was supported by substantial evidence. The hearing examiner considered both risk

[4] The plaintiff also faults the hearing examiner for failing to mention that he only offended against family members, because, he points out, factor 7 indicates that offenders who only target intrafamilial victims may be at a lower risk to reoffend than offenders who target unrelated victims. However, because "having an intrafamilial victim is not a risk mitigating, nor a risk elevating, factor," 803 Code Mass. Regs. § 1.33(7)(a)(1), we conclude there was no error.

elevating and mitigating factors and weighed them. We discern no abuse of discretion in the weighing of these factors and conclude that the level three classification was established by clear and convincing evidence.[5]

Judgment affirmed.

By the Court (Rubin, Kinder & Singh, JJ.[6]),



Clerk

Entered: July 10, 2019.

[5] The plaintiff's constitutional claims have been addressed several times by our appellate courts, and do not warrant further discussion here. See, e.g., Doe, Sex Offender Registry Bd. No. 380316, 473 Mass. at 314 (classification procedure applying clear and convincing standard satisfies offender's procedural due process rights); Opinion of the Justices, 423 Mass. 1201, 1239-1241 (1996) (notification requirements part of distinct regulatory regime and not penal); Commonwealth v. Olaf O., 57 Mass. App. Ct. 918, 918-919 (2003) (same).

[6] The panelists are listed in order of seniority.